5'542 "Self help" repo by D not w/in contemplation of Ga. law.

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Brunswick Division

In the matter of:	
RANDY GUNTER CATHIE GUNTER (Chapter 13 Case 288-00514)	Adversary Proceeding Number 288-0035
Debtors	
GILMAN UNITED FEDERAL CREDIT UNION	
Plaintiff	
v.	
RANDY GUNTER CATHIE GUNTER	
Defendants	

FILED
at 4 O'clock & 24 min. P M
Date 6/1/89
MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia PCB

MEMORANDUM AND ORDER

On February 2, 1989 a trial was held upon the complaint of Gilman United Federal Credit Union ("Gilman"). Gilman seeks to require the Debtors to return an automobile to it and to have the same declared not subject to the automatic stay. After consideration of the evidence adduced at trial and the

letter briefs submitted by the parties, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1) The Debtors purchased a 1987 Chevrolet Monte Carlo automobile in March, 1987. The Debtors received financing from Gilman and were obligated to make bi-weekly installments in the amount of $184.00. As of August 31, 1988, the Debtors were two payments behind. The Debtors voluntarily consented to repossession and Randy Gunter drove the car to the Credit Union and turned over the keys. The automobile was parked on the private lot of the Credit Union.

Gilman sent a letter postmarked September 1, 1988, to the Debtors informing them of their rights of redemption under Georgia Law. The letter states in relevant part: "You have an absolute right to redeem the collateral repossessed and take possession of such goods at any time prior to the date that the collateral is finally sold. You can redeem the above described goods and terminate any further obligation under your contract by paying the sum of $11,629.96 to Gilman United Federal Credit Union. You may exercise your right of redemption at any

time prior to Sept. 11, 1988, which is the first date that said goods will be offered for sale, or at any time thereafter until the goods are finally sold." (Emphasis original)

After the Debtors voluntarily consented to the repossession, they, apparently, had second thoughts. The Debtors through their lawyers, initially Eleanor Dotson and thereafter Robert Baer, contacted Gilman in an attempt to have the car returned to them. The Debtors, through counsel, apprised Gilman that it was their intention to file a petition in bankruptcy. Further, the Debtors attempted to tender the two payments which were past due. Gilman steadfastly refused to return the vehicle to the Debtors unless and until the Debtors exercised their right of redemption, the terms of which were specified in the letter postmarked September 1, 1988.

Fearing imminent sale of the automobile, the Debtors upon advise of counsel, Robert Baer, proceeded to exercise a "self-help" remedy of their own. The Debtors had a new set of car keys made, and after work on September 12, 1988, Cathie Gunter went to the Credit Union parking lot, unlocked the car and drove it off the lot. She parked the car at her mother's house, where it could not be seen from the road. As of September 13, 1988, Gilman had not sold the automobile.

3) On September 14, 1988, the Debtors filed a Chapter 13 petition.

4) At trial, Gilman valued the vehicle at $11,000.00. The Debtors have proposed a 100% Chapter 13 Plan in which Gilman is listed as having a $11,613.66 claim owing in installment amounts of $184.12 due bi-weekly. As of April 12, 1989, the Debtors are current in their payments to the Chapter 13 Trustee. The car is necessary to enable to Debtor to commute the twenty miles to her place of employment each day. The Debtors do not have sufficient funds on hand from which they could make a downpayment on another vehicle.

CONCLUSIONS OF LAW

The Debtors argue in their letter brief that they "merely availed themselves of 'self-help' when they redeemed their collateral on September 12, 1988 by picking the car up from the Credit Union and tendered default payment through their Chapter 13 Plan, thus complying with O.C.G.A. Section 11-9-506." The Debtors' argument is utterly without merit.

The "self-help" remedy under commonlaw as codified in O.C.G.A. Section 11-9-503[1] is available to a secured party, not a debtor. Gilman, as a secured creditor who had taken possession of the vehicle, had every right to refuse the demands of the Debtors to turn the vehicle over to them unless and until the Debtors exercised their statutory right under O.C.G.A. Section 11-9-506[2] to redeem the collateral. The Debtors did not exercise their redemption right under O.C.G.A. Section 11-9-506. In addition to the remedies afforded to the Debtors under state law, the Debtors could have lawfully availed themselves of the

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[1] 11 U.S.C. Section 11-9-503. "Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusuable, and may dispose of collateral on the debtor's premises under Code Section 11-9-504." (Emphasis added)

[2] 11 U.S.C. Section 11-9-506. "At any time before the secured party has disposed of collateral or entered into a contract for its disposition under Code Section 11-9-504 or before the obligation has been discharged under Code Section 11-9-505(2) the debtor or any other secured party may unless otherwise agreed in writing after default redeem the collateral by tendering fulfillment of all obligations secured by the collateral as well as the expenses reasonably incurred by the secured party in retaking, holding, and preparing collateral for disposition, in arranging for the sale, and to the extent provided in the agreement and not prohibited by law, his reasonable attorneys' fees and legal expenses."

added protections otherwise available to them under Title 11 of the United States Code by filing a petition in bankruptcy and, thereafter, pursuing a turnover of the vehicle under 11 U.S.C. Section 542. Rather than pursuing lawful means of obtaining possession of the vehicle, the Debtors chose, apparently upon advice of counsel, to take matters into their hands and take possession of the vehicle which was lawfully in the possession of Gilman. Such patent disregard of pursuing lawful remedies is intolerable. As such, the stay will be modified for cause to the extent necessary and for the limited purpose of allowing Gilman to pursue damages in State Court for the allegedly tortious manner in which the Debtors took possession of the vehicle. For the reasons stated forthwith, however, the Plaintiff's prayers that the Debtors be ordered to return the car are denied.

Although the Plaintiff states in its prayer for relief that "Defendants had relinquished their interest in said car when they voluntarily returned it to the Plaintiff prior to the filing of this bankruptcy proceeding . . . ", it cannot seriously be argued that the voluntary surrender by the Debtors amounts to a waiver of its right of redemption. In the first place, under 11 U.S.C. Section 11-9-506 as construed in Kellos v. Parker-Sharpe, Inc., 245 Ga. 130 (1980), the right to redeem collateral may be waived by written agreement after default, but

not before default. Simply put, there has been no written agreement. Moreover, "[b]y repossessing the collateral, the secured creditor acquires only possession. He does not thereby become the owner of the collateral." 9 Anderson on the Uniform Commercial Code, §9-503:5, at 652 (3rd ed. 1985). The repossession in itself does not divest the debtor of all rights in the collateral. The Debtors had the right to redeem the collateral at any time before Gilman disposed of it or entered into a contract for its disposition. O.C.G.A. §11-9-506.

In a typical case, an inquiry into the pre-petition facts and circumstances surrounding the Debtors' alleged interest in the subject automobile would be made to determine if the Debtors' interest had been terminated prior to the filing of a petition. For instance, if a repossessed automobile is sold to a third party prior to the debtor filing its petition, the debtor would no longer have a cognizable interest in the property which could be protected by the automatic stay. See O.C.G.A. Section 11-9-506. If, however, the debtor's rights in the collateral have not been fully terminated prior to the petition leaving the debtor with an equity of redemption as of the petition was filed, such an interest is sufficient to warrant surrender under 11 U.S.C. Section 542(a). United States v. Whiting Pools, Inc., 462 U.S. 198 (1983); In re Wright, Jr., Adv.Pro. 187-0038 (Bankr.

S.D.Ga. 1988). Admittedly, this case is not the typical case. On the one hand, the Debtors' self-help repossession upon advice of counsel cannot be condoned.[3] On the other hand, the evidence in this case does not indicate that Gilman had entered into a contract for disposition of the collateral, so as to have allowed the disposition of the collateral before the petition had been filed on September 14, 1988. So long as the Debtors interest in the property was not terminated as of the date the petition was filed, the automatic stay operated to protect their property interest. In the absence of evidence to the contrary, the Debtors would have been entitled under 11 U.S.C. Section 542, to force Gilman to turnover the automobile to them, provided that Gilman was shown to be adequately protected. In re Wright,

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[3] The Debtors' behavior is especially offensive when one considers that the Debtor/Husband is presently employed as a police officer in the Kingsland Police Department. One would expect, that a police officer would respect, not flaunt, the law which he is employed to uphold and enforce. To his credit, he sought and received the advice of counsel.

supra. Accordingly, since Debtors obtained possession by other means and their property interest in the car was not terminated pre-petition, the Debtors may retain possession of the automobile, subject to the conditions stated hereafter.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that:

1) The stay is modified to the extent necessary and for the limited purpose of allowing Gilman United Federal Credit Union to pursue damages in State Court if it choses to do so for the allegedly tortious manner in which the Debtors took possession of the automobile;

2) The Debtors may retain possession and use of the automobile in question provided that sufficient funding is paid into the Debtors' Chapter 13 Plan on a current and regular basis so as to insure that Gilman United Federal Credit Union receives on a monthly basis the equivalent of the $184.12 bi-weekly installment amount

owing on the automobile. Further, the Debtors shall prior to or at confirmation cure any pre-petition arrearages on the automobile which may exist.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia
This 23rd day of May, 1989.